

# Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights

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John Randolph Tucker, for whom this lecture series is named, when asked how he could serve as counsel for the Haymarket Anarchists in *Spies v. Illinois*,<sup>1</sup> reportedly answered: "I do not defend anarchy. I defend the Constitution."<sup>2</sup>

Such a voice is needed in this country's crime debate today to remind Americans that those who argue for fairness in our criminal justice system do not defend crime, they defend the Constitution. Such a voice is needed because, increasingly, due process and other guarantees of the Bill of Rights are regarded as little more than inconvenient impediments to ridding our society of murderers, rapists, robbers, and other criminals.

That voice has been missing in the exceptionally one-sided debate on crime that has dominated politics in the United States for the last thirty years. Americans have been told that the answer to the crime problem is longer prison terms, harsher conditions of imprisonment, greater use of the death penalty, less due process, and less judicial review.<sup>3</sup> There has been

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1. 123 U.S. 131 (1887).

2. John W. Davis, *John Randolph Tucker: The Man and His Work*, 6 WASH. & LEE L. REV. 139, 142 (1949).

3. See, e.g., David Johnston & Tim Weiner, *Seizing the Crime Issue, Clinton Blurs Party Lines*, N.Y. TIMES, Aug. 1, 1996, at A1 (describing President Clinton's successful effort to take "crime issue" away from Republicans by embracing punitive measures such as expanding federal death penalty, limiting death row appeals, and constructing more prisons).

virtually no debate among politicians about the wisdom of these measures — whether they constitute an effective crime control policy or whether they will actually make Americans safer in their homes and on the streets.<sup>4</sup>

Instead, politicians have engaged one another over the question of who is the "toughest." Those who promised "three strikes and you're out" — life imprisonment for persons convicted of three felonies<sup>5</sup> — were quickly topped by those promising "two strikes and you're out."<sup>6</sup> The Clinton administration has even issued a "one strike, you're out" rule for people who commit certain crimes while living in public housing.<sup>7</sup>

Those who promised to imprison more were topped by those who promised to make conditions within prisons even harsher by removing exercise equipment, eliminating educational and vocational programs, and even restoring chain gangs.<sup>8</sup> Those who promised the death penalty for some crimes were topped by those who supported the death penalty for even more crimes.

4. Although politicians in both major parties have been unwilling to question these policies for fear of appearing "soft on crime," academics and other commentators have questioned them. See generally, e.g., CAMPAIGN FOR AN EFFECTIVE CRIME POLICY, THE IMPACT OF "THREE STRIKES AND YOU'RE OUT" LAWS: WHAT HAVE WE LEARNED? (Sept. 1996) (analyzing effect and impact of "three strikes" laws); David J. Rothman, *The Crime of Punishment*, N.Y. REV. BOOKS, Feb. 17, 1994, at 34 (reviewing several books and studies of crime and corrections policies).

5. See CAMPAIGN FOR AN EFFECTIVE CRIME POLICY, *supra* note 4, at 1, 11-12 (describing "three strikes" laws of federal government and 22 states); Fox Butterfield, *New Prisons Cast Shadow over Higher Education*, N.Y. TIMES, Apr. 12, 1995, at A21 (describing impact of "three strikes and you're out" law in California). For the first time, California is spending more on its prisons than on its two university systems. *Id.*

6. Georgia Governor Zell Miller proposed "two strikes and you're out" in his 1994 campaign for re-election. Leslie Phillips, *Crime Pays*, USA TODAY, Oct. 10, 1994, at 11A. The Georgia legislature enacted such a provision. GA. CODE ANN. § 17-10-7 (Supp. 1996); see also Editorial, *Georgia's 'Two Strikes' Tough Enough*, ATLANTA J. & CONST., Mar. 6, 1995, at A8 (suggesting law is tough enough and should not be expanded); Rhonda Cook, *Lock 'Em Up*, ATLANTA J. & CONST., Mar. 26, 1995, at R1 (describing "two strikes" law and other measures resulting in greater rates of imprisonment in Georgia).

7. Johnston & Weiner, *supra* note 3.

8. See Rick Bragg, *Chain Gangs to Return to Roads of Alabama*, N.Y. TIMES, Mar. 26, 1995, § 1, at 1 (describing return of chain gangs to Alabama); Adam Nossiter, *Making Hard Time Harder, States Cut Jail TV and Sports*, N.Y. TIMES, Sept. 17, 1994, at A1 (describing efforts to take away television and exercise equipment for prisoners in many states); Neal R. Peirce, *America's Angry Penal Policy*, BALT. SUN, July 29, 1996, at 9A (describing America's penal policy of 1990s as one of "meanness and retribution"); Charles Walton, *Prison Chief Wants Inmates Walking, Working Daily: 4-Mile Treks Now Part of Jail "Experience"*, ATLANTA J. & CONST., Jan. 3, 1996, at A1 (reporting that new head of Georgia's Department of Corrections, declaring that 30-35% of Georgia's prisoners "ain't fit to kill," would require inmates to make four-mile walks and to dig ditches).

And politicians have delivered on their promises. The United States incarcerates a greater percentage of its population than any other country in the world.<sup>9</sup> Thirty-eight states provide for the death penalty,<sup>10</sup> and over fifty federal crimes are punishable by death.<sup>11</sup> More people were executed in the United States last year than in any year since the reinstatement of capital punishment in 1976.<sup>12</sup> The United States leads the world in the execution of children and is one of only five countries in the world that has executed children in the last six years.<sup>13</sup> The others are Iran, Pakistan, Saudi Arabia, and Yemen.<sup>14</sup>

Politicians have also told Americans that less process and less judicial review is the answer to the crime problem. In particular, they have attacked federal habeas corpus review of state court convictions. Habeas corpus is the mechanism by which a person convicted in a state or federal court may petition the federal courts for review of a conviction or sentence on the grounds that it was obtained in violation of the Constitution.<sup>15</sup> As the Supreme Court once observed:

Over the centuries [the writ of habeas corpus] has been the common law world's "freedom writ" by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free. We repeat what has been so truly said of the federal writ: "there is no higher duty than to maintain it unimpaired," and unsuspended, save only in the cases specified in our Constitution.<sup>16</sup>

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9. *U.S. Incarceration Rate Has Slowed*, WASH. POST, Jan. 20, 1997, at A16 (reporting Department of Justice announcement that there are 1.6 million inmates in prison and jails, giving United States incarceration rate of 615 per 100,000, higher even than Russia's).

10. NAACP LEGAL DEF. & EDUC. FUND, DEATH ROW, U.S.A. 1 (Summer 1996) [hereinafter DEATH ROW, U.S.A.].

11. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 60001-60026, 108 Stat. 1796, 1959-82 (codified as amended in scattered sections of 18 U.S.C.) (providing death penalty for over fifty crimes); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4181, 4387 (codified at 21 U.S.C. § 848(e) (1994)) (authorizing death penalty for drug "king-pins").

12. DEATH ROW, U.S.A., *supra* note 10, at 2 (reporting fifty-six executions in 1995).

13. AMNESTY INT'L, FACTS AND FIGURES ON THE DEATH PENALTY 2 (Oct. 1996).

14. *Id.*

15. 28 U.S.C. §§ 2241-2255 (1994); see *Fay v. Noia*, 372 U.S. 391, 394-426 (1963) (describing history and role of Great Writ).

16. *Smith v. Bennett*, 365 U.S. 708, 712-13 (1961) (quoting *Bowen v. Johnson*, 306 U.S. 19, 26 (1939)).

However, politicians have recently attacked habeas corpus as delaying executions, disrupting the administration of criminal justice by the states, causing friction between federal and state courts, and frustrating the fight against crime. In an effort to increase the number and speed of executions, Congress eliminated funding for death penalty resource centers, which provided lawyers to the condemned in habeas corpus proceedings,<sup>17</sup> and passed the Antiterrorism and Effective Death Penalty Act of 1996,<sup>18</sup> which places new, unprecedented restrictions on habeas corpus review.<sup>19</sup>

For the first time in the nation's history, Congress has imposed a statute of limitations on petitions for habeas corpus relief.<sup>20</sup> The Act also prohibits federal courts from granting habeas corpus relief unless the decision of the state court "involved an unreasonable application of clearly established Federal law,"<sup>21</sup> severely limits when a federal court may conduct an evidentiary hearing,<sup>22</sup> and prohibits second or "successive" petitions for habeas corpus relief except in very narrow circumstances.<sup>23</sup>

The purpose, scope, and wisdom of federal habeas corpus review has long been debated.<sup>24</sup> Traditionally, habeas corpus review has existed to correct violations of constitutional rights, not to relitigate issues of guilt or innocence. However, in proposing restrictions on habeas corpus review in 1970, Judge Henry J. Friendly of the United States Court of Appeals for

17. Marcia Coyle, *Republicans Take Aim at Death Row Lawyers*, NAT'L L.J., Sept. 18, 1995, at A1.

18. Pub. L. No. 104-132, 110 Stat. 1214 (amending 28 U.S.C.A. §§ 2241-2255 and adding 28 U.S.C.A. §§ 2261-2266) (West 1994 & Supp. 1996).

19. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 107, 110 Stat. 1214, 1221-26 (codified at 28 U.S.C.A. §§ 2261-2266).

20. *Id.* §§ 101, 105 (codified at 28 U.S.C.A. §§ 2244, 2255) (amending 28 U.S.C. § 2244(d)(1) to establish one-year statute of limitations). A statute of limitations of 180 days is provided by Section 107 of the Act, codified at 28 U.S.C.A. § 2263, for states that meet certain standards of providing counsel in capital post-conviction proceedings.

21. Antiterrorism and Effective Death Penalty Act of 1996 § 104(3)(3) (codified at 28 U.S.C.A. § 2254(d)(1)).

22. *Id.* § 104(3)(4) (codified at 28 U.S.C.A. § 2254(e)(2)).

23. *Id.* §§ 105, 106 (codified at 28 U.S.C.A. §§ 2255, 2244) (limiting any successive habeas corpus petition to constitutional violations that result in conviction of innocent person or involve new rule of law that applies retroactively to cases on collateral review).

24. See generally Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992); Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1 (1990); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331 (1993).

the Second Circuit raised the question of whether innocence was a proper consideration in the collateral review of criminal judgments.<sup>25</sup> He answered the question in the affirmative, proposing that, with certain exceptions, habeas corpus relief should be granted only when the prisoner could establish a constitutional violation and make a colorable claim of innocence.

Today, in light of the drastic restrictions on habeas corpus review that have recently become law, it is appropriate to ask a different question: whether fairness is irrelevant to the processes by which the loss of life and liberty is determined.

Although many argue that constitutional protections only get in the way of convicting the guilty, most would agree — at least, in the abstract — with the importance of *process*: a proceeding conducted in accordance with established rules, presided over by an impartial judge, in which the accused is capably represented by a competent lawyer, and in which the outcome is not influenced by improper factors such as race, politics, or economic status. The legal system supposedly strives to provide this sort of process.

But in practice, we encounter questions about how best to ensure fairness and whether fairness is worth the cost involved. Under our concept of federalism, what are the relative roles of the state and federal courts in ensuring fairness? Are state court judges — most of whom must stand for periodic election or retention — sufficiently insulated from political pressures so that they can enforce the protections of the Constitution? When we discover after a trial that the process was deficient, does our commitment to fairness include a willingness to allocate the resources needed to conduct a second trial? Is there a point at which finality — bringing proceedings to an end — is more important than fairness?

In exploring these questions, I would like to review the role that habeas corpus has played in ensuring justice in our history, examine two fundamental components of fairness in the state systems — the impartiality of judges and the provision of counsel for those too poor to retain a lawyer — and then describe why fairness matters and what we can do to bring about a greater commitment to fairness in our system of justice.

### *The Once-Great Writ of Habeas Corpus*

There is no better example of the importance and value of the writ of habeas corpus than the case of Rubin "Hurricane" Carter, who was freed by a federal judge after being wrongfully imprisoned by New Jersey for almost twenty years.

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25. See Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

Carter, an African-American, was the number-one-ranked contender for the middleweight boxing crown in 1966 when he and a companion were arrested and charged with the murders of three white people.<sup>26</sup> They were convicted and narrowly escaped the death penalty.<sup>27</sup> While in prison, Carter wrote the story of his life.<sup>28</sup> In 1980, Lesra Martin, a 16-year-old African-American youth from Brooklyn, who had been taken in by a group of Canadians, bought a copy of Carter's book for one dollar at a used-book fair in Toronto.<sup>29</sup> He and his Canadian friends read the book and became convinced of Carter's innocence. Working with attorneys Myron Beldock and Leon Friedman, the Canadians spent four and one-half years investigating the case and providing Carter with moral support.<sup>30</sup>

After Carter had been rejected many times in New Jersey courts, United States District Court Judge H. Lee Sarokin granted habeas corpus relief in 1985 after concluding that the prosecution had withheld critical exculpatory evidence and improperly argued racial hatred as the motive for the crime.<sup>31</sup> Carter was released and has lived in Canada ever since.

Today, Rubin Carter is one of the most eloquent spokesmen in support of the writ of habeas corpus. He has testified before Congress and spoken at law schools.<sup>32</sup> He is the director of an international organization, the Association in Defense of the Wrongly Convicted, and seeks the release of other people who were wrongfully convicted and imprisoned. He is a living example of the value of the Great Writ.

But federal habeas corpus relief has corrected other injustices besides the conviction of innocent people. For example, the United States Supreme Court unanimously ordered habeas corpus relief for Tony Amadeo after it was revealed at a federal evidentiary hearing that the prosecutor had secretly directed jury commissioners to under-represent African-Americans in the jury pools.<sup>33</sup> Amadeo had been sentenced to death by a jury drawn

26. *State v. Carter*, 255 A.2d 746, 748-49 (N.J. 1969).

27. *See id.* at 755.

28. RUBIN "HURRICANE" CARTER, *THE 16TH ROUND: FROM NUMBER 1 CONTENDER TO #45472* (1974).

29. *See* William Nack, *True to His Words*, *SPORTS ILLUSTRATED*, Apr. 13, 1992, at 81, 82-83.

30. *See id.* at 84-88, 90, 92, 95; *see also* SAM CHAITON & TERRY SWINTON, *LAZARUS AND THE HURRICANE* (1991) (describing freeing of Rubin Carter).

31. *Carter v. Rafferty*, 621 F. Supp. 533, 558 (D.N.J. 1985), *aff'd in part, appeal dismissed in part*, 826 F.2d 1299 (3d Cir. 1987).

32. *See, e.g.*, Rubin "Hurricane" Carter, *Death Penalty Symposium Keynote Address*, 35 SANTA CLARA L. REV. 425 (1995); Ira Berkow, *Justice Delayed Is Bitter Justice for Carter*, *N.Y. TIMES*, Jan. 24, 1993, § 8, at 2.

33. *Amadeo v. Zant*, 486 U.S. 214, 219-21 (1988).

from the rigged pools in a Georgia state court.<sup>34</sup>

Jimmy Horton was granted habeas corpus relief based on evidence presented at a federal evidentiary hearing that the prosecutor, who struck African-Americans to get the all-white jury that sentenced Horton to death, routinely struck all black citizens from jury service.<sup>35</sup>

William Alvin Smith, a mentally retarded youth sentenced to death in Georgia, was granted habeas corpus relief after a federal district court judge heard evidence of Smith's mental retardation and concluded that, because of his disability, Smith did not understand the *Miranda* rights read to him.<sup>36</sup>

Amadeo, Horton, and Smith were not innocent, but they were unconstitutionally sentenced to death.<sup>37</sup> Like many others granted federal habeas corpus relief, they were not resentenced to death upon return to the state courts. Tony Amadeo graduated *summa cum laude* from Mercer University in the summer of 1995.

Under the Antiterrorism and Effective Death Penalty Act of 1996, it is doubtful whether evidentiary hearings would even be granted in these and scores of other cases in which relief was granted under the previous law. The constitutional violations will still exist, but under the new Act, federal courts are prohibited from conducting evidentiary hearings and receiving evidence of the violations.

Nor is it clear that relief would be granted in many of these cases under the new standard of review that prohibits federal courts from setting aside a state court's legal conclusions, unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law."<sup>38</sup>

In addition, many of those who languish in prison for years before getting a lawyer, as did Rubin Carter, will be denied even a chance to present their claims to a federal court because without a lawyer they will be unable to comply with the one-year statute of limitations. The Supreme

34. *Id.* at 217.

35. *Horton v. Zant*, 941 F.2d 1449, 1455-60 (11th Cir. 1991).

36. *Smith v. Kemp*, 664 F. Supp. 500, 505 (M.D. Ga. 1987), *aff'd by equally divided court*, 887 F.2d 1407 (11th Cir. 1989).

37. Amadeo, Horton, and Smith are but a few of the many people unconstitutionally sentenced to death who received habeas corpus relief from federal courts. Even with the development of many procedural barriers to federal habeas corpus review, federal courts found constitutional error in 40% of the first 361 capital judgments reviewed in habeas corpus proceedings between the restoration of the death penalty in 1976 and mid-1991. James S. Liebman, *More than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537, 541 n.15 (1991).

38. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104(3), 110 Stat. 1214, 1219 (codified at 28 U.S.C.A. § 2254 (West Supp. 1996)).

Court has held that states are not required to provide counsel for the poor for state post-conviction review,<sup>39</sup> even in capital cases.<sup>40</sup> For hundreds of those serving noncapital sentences and even for some under death sentences, time will run out before they can get a lawyer who will prepare a petition. The statute of limitations also creates the possibility of fatal consequences to the client for a mistake by counsel. The person whose lawyer misses the deadline created by the statute of limitations apparently will be barred from ever seeking federal review.<sup>41</sup>

A statute of limitations for habeas corpus actions was previously proposed by a committee chaired by retired Justice Lewis Powell and by the American Bar Association (ABA), but both proposals linked the statute of limitations to the provision of counsel at all stages of review; a state would get the benefit of a statute of limitations only if it provided competent counsel at all stages of the process.<sup>42</sup> However, the one-year statute of limitations contained in the Antiterrorism and Effective Death Penalty Act of 1996 is not dependent upon the states providing counsel to those who would be affected by the deadline.<sup>43</sup> Before adopting the Act, Congress made it even more difficult for those most in need of counsel — those under death sentence — to obtain representation by eliminating funding for death penalty resource centers.<sup>44</sup> Thus, poor people who may be wrongfully imprisoned or sentenced to death now face a new, complex set of barriers to vindication of their constitutional rights, but do not even have lawyers to help them understand the Act or comply with its provisions.

Even before passage of the Antiterrorism and Effective Death Penalty Act of 1996, the Supreme Court had greatly restricted the availability of

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39. *Ross v. Moffitt*, 417 U.S. 600, 614-18 (1974).

40. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989).

41. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (barring federal habeas review of issues raised in state post-conviction proceedings because counsel failed to file timely notice of appeal in state court).

42. JUDICIAL CONF. OF THE U.S., AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES: COMMITTEE REPORT AND PROPOSAL 4-6 (1989) (finding "pressing need for qualified counsel to represent inmates in collateral review" and proposing six-month statute of limitations to apply in states that provide counsel in collateral review); *see also* Robbins, *supra* note 24, at 11, 16 (finding that "the inadequacy and inadequate compensation of counsel at trial" are among "principal failings of the capital punishment review process today" and recommending that states be required to provide counsel in state post-conviction proceedings and adopt one-year statute of limitations).

43. An even shorter statute of limitations of six months is provided in capital cases for states that provide counsel at all stages and that meet certain standards in doing so. Antiterrorism and Effective Death Penalty Act of 1996 § 107 (codified at 28 U.S.C.A. § 2263 (West Supp. 1996)).

44. Coyle, *supra* note 17.



habeas corpus relief. The Court adopted and rigorously enforced strict rules of procedural default,<sup>45</sup> excluded Fourth Amendment claims from habeas corpus review,<sup>46</sup> made it more difficult for a habeas petitioner to obtain an evidentiary hearing to prove a constitutional violation,<sup>47</sup> adopted an extremely restrictive doctrine regarding the retroactivity of constitutional decisions,<sup>48</sup> reduced the burden on the states to establish harmless error once a constitutional violation was found,<sup>49</sup> and erected barriers to the filing of a second habeas petition.<sup>50</sup>

Justice Harry Blackmun found the majority of the Supreme Court to be on a "crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims," which resulted in a "Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights."<sup>51</sup> Justice John Paul Stevens observed that "the Court has lost its way in a procedural maze of its own creation" and "grossly misevaluated the requirements of 'law and justice.'"<sup>52</sup> However, instead of pointing a way out of the maze, Congress created even more barriers to appellate review that will produce even more arbitrary and unjust results.

Those on the Court and elsewhere who have advocated limiting habeas corpus review say restrictions are necessary to serve the interests of federalism, comity, expense minimization, and finality. For example, in holding

45. The Court adopted the "cause" and "prejudice" standard in *Wainwright v. Sykes*, 433 U.S. 72, 88-91 (1977). In later decisions, the Court strictly applied the procedural default rules to bar constitutional claims. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 729-57 (1991); *Dugger v. Adams*, 489 U.S. 401, 406-11 (1989); *Smith v. Murray*, 477 U.S. 527, 533-36 (1986); *Engle v. Isaac*, 456 U.S. 107, 130-34 (1982); *Timothy J. Foley, The New Arbitrariness: Procedural Default of Federal Habeas Claims in Capital Cases*, 23 LOY. L.A. L. REV. 193, 195 (1989).

46. *Stone v. Powell*, 428 U.S. 465, 482-95 (1976).

47. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5-12 (1992).

48. *Teague v. Lane*, 489 U.S. 288, 297-99 (1989). For a discussion of the Court's retroactivity doctrines, see generally Liebman, *supra* note 37.

49. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). In *Brecht v. Abrahamson*, the Court held that habeas corpus relief is not to be granted unless the Court concludes that the constitutional error had "substantial and injurious effect or influence in determining the jury's verdict." *Id.* (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). In contrast, on direct appeal, once a constitutional violation is established, relief must be granted unless the government can establish that the error was "harmless beyond a reasonable doubt." *Id.* at 630 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

50. *McCleskey v. Zant*, 499 U.S. 467, 477-503 (1991).

51. *Coleman v. Thompson*, 501 U.S. 722, 758-59 (1991) (Blackmun, J., dissenting).

52. *Smith v. Murray*, 477 U.S. 527, 541 (1986) (Stevens, J., dissenting).

that Roger Keith Coleman's claims were barred because his lawyer was late in filing his notice of appeal, Justice Sandra Day O'Connor opened the majority opinion with the sentence, "This is a case about federalism."<sup>53</sup> Justice Blackmun observed in dissent:

Federalism; comity; state sovereignty; preservation of state resources; certainty: The majority methodically inventories these multifarious state interests . . . . One searches the majority's opinion in vain, however, for any mention of petitioner Coleman's right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death.<sup>54</sup>

Restrictions on federal habeas corpus review also rest on the confidence that state court judges will enforce the Constitution as well as their federal counterparts.<sup>55</sup> It is important to assess whether this confidence is misplaced because state court judges are clearly left with the primary responsibility for enforcing the Constitution and ensuring fairness as a result of the changes brought about by the Court and Congress.

### *The Lack of Independence of State Judges*

State court judges in most states lack the independence and security of federal judges who have tenure for life.<sup>56</sup> State court judges in all but a handful of states must stand for election.<sup>57</sup> In criminal cases, enforcing the law may cost them their jobs. An elected judge who upholds a constitutional right of a person accused of child molestation, murder, or some other crime may be signing his or her own political death warrant.

53. *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

54. *Id.* at 758 (Blackmun, J., dissenting).

55. *See, e.g.,* *Brecht v. Abrahamson*, 507 U.S. 619, 636 (1993) (rejecting argument that less demanding harmless-error standard in federal habeas review will result in state courts refusing to find error harmless, unless litigants showed "affirmative evidence that state-court judges are ignoring their oath"); *Sumner v. Mata*, 449 U.S. 539, 549 (1981) (expressing view that deference to state court fact-finding is appropriate because "[s]tate judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted, all are not doing their mortal best to discharge their oath of office"). *But see* *Stone v. Powell*, 428 U.S. 465, 525 (1976) (Brennan, J., dissenting) (asserting that "[s]tate judges popularly elected may have difficulty resisting popular pressures not experienced by federal judges given lifetime tenure").

56. U.S. CONST. art III, § 1.

57. Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 777-79 nn.85-89 (1995) (noting that in forty-two states overall, and in thirty-two of thirty-eight states that have death penalty, judges stand for election or retention).

Justice Penny White was voted off the Tennessee Supreme Court after a decision by that court in a death penalty case caused the Republican Party and other groups to oppose her retention. Immediately after the retention election, the Governor of Tennessee, Don Sundquist, said: "Should a judge look over his shoulder [in making decisions] about whether they're going to be thrown out of office? I hope so."<sup>58</sup> This view contrasts sharply with a statement made by Justice Stevens at the ABA meeting in Orlando the same month: "It was never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes."<sup>59</sup>

Justice White's opponents succeeded in turning her retention election into a referendum on the death penalty. The Tennessee Conservative Union sent out a letter that opened with the following description of crimes committed by Richard Odom:

78-year-old Ethel Johnson lay dying in a pool of blood. Stabbed in the heart, lungs, and liver, she fought back as best she could. Her hands were sliced to ribbons as she tried to push the knife away. And then she was raped. Savagely.

. . . But her murderer won't be getting the punishment he deserves. Thanks to Penny White.<sup>60</sup>

The Republican Party mailed a brochure to voters titled, "Just Say NO!" with the slogan, "Vote for Capital Punishment by Voting NO on August 1 for Supreme Court Justice Penny White."<sup>61</sup> Inside, the brochure described three cases to demonstrate that Justice White "puts the rights of criminals before the rights of victims."<sup>62</sup> It described the same case as follows:

Richard Odom was convicted of repeatedly raping and stabbing to death a 78 year old Memphis woman. However, Penny White felt the crime wasn't heinous enough for the death penalty — so she struck it down.<sup>63</sup>

Neither mailing disclosed that Odom's case was reversed because all five members of the Tennessee Supreme Court agreed that there had been at

58. Paula Wade, *White's Defeat Poses a Legal Dilemma: How Is a Replacement Justice Picked?*, MEM. COM. APPEAL, Aug. 3, 1996, at A1.

59. Justice John Paul Stevens, Opening Assembly Address at the American Bar Association Annual Meeting 12 (Aug. 3, 1996) (quoting Florida Supreme Court Justice Ben Overton).

60. Duren Cheek, *Campaign Against White over Rape Case Unfair, Supporters Say*, NASHVILLE TENNESSEAN, June 20, 1996, at 3B (quoting letter).

61. TENNESSEE REPUBLICAN PARTY, *JUST SAY NO!* (1996) (pamphlet on file with author).

62. *Id.*

63. *Id.*

least one legal error that required a new sentencing hearing.<sup>64</sup> Nor did they mention that the Tennessee Court of Criminal Appeals also concluded that Odom was entitled to a new sentencing hearing.<sup>65</sup> The Tennessee Supreme Court affirmed Odom's conviction and remanded his case for a new sentencing hearing.<sup>66</sup> No member of the court expressed the view that the crime was not heinous enough to warrant the death penalty. Indeed, the remand for a new sentencing hearing made it quite clear that the court did not find the death penalty inappropriate for Odom. Justice White did not write the majority opinion, a concurring opinion, or a dissenting opinion in the case. Yet Tennessee voters were led to believe that she had personally struck down Odom's death penalty because she did not think the crime was "heinous enough."

Justice White's opponents also blamed her for the fact that Tennessee has not carried out any executions in the last thirty-six years.<sup>67</sup> But the Odom case was the only capital case that came before the court during White's nineteen months on the court.<sup>68</sup> Justice White was opposed by Tennessee's governor and both its United States Senators, all Republicans.<sup>69</sup>

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64. See *State v. Odom*, 928 S.W.2d 18, 32-33 (Tenn. 1996). In an opinion by Justice Birch, three members of the court held that there were three errors requiring reversal. *Id.* The remaining two members of the court concurred with regard to one error, but dissented with regard to the other two. *Id.* at 33 (Anderson, C.J., concurring in part and dissenting in part).

65. See *State v. Odom*, No. 02C01-9305-CR-00080, 1994 WL 568433, at \*6-\*10, \*24 (Tenn. Crim. App. Oct. 19, 1994) (reversing and remanding for new sentencing hearing because defendant was precluded from presenting mitigating evidence at penalty phase), *aff'd*, 928 S.W.2d 18 (Tenn. 1996).

66. *State v. Odom*, 928 S.W.2d at 18.

67. See Jeff Woods, *Sundquist Admits Early Ballot to Boot White*, NASHVILLE BANNER, July 26, 1996, at B2 (reporting that "White's foes are casting the election as a referendum on the death penalty"). After the election, Governor Sundquist said White was defeated because voters "believe it's wrong that we haven't enforced the death penalty in 36 years, despite the overwhelming need and support for it." Tom Humphrey, *White Ouster Signals New Political Era; Judges May Feel 'Chilling Effect'*, KNOXVILLE NEWS-SENTINEL, Aug. 4, 1996, at A1. Republican Party chair Jim Burnett said: "The public was fed up. We've had a death penalty since 1976 and we haven't had an execution yet." John Gibeaut, *Taking AIM*, A.B.A.J., Nov. 1996, at 50, 51; see also Editorial, *Litmus Test vs. The Law*, NASHVILLE TENNESSEAN, Aug. 6, 1996, at 6A ("Without a doubt, many of the voters who voted against White were expressing their frustration with the fact that Tennessee has not executed a death row inmate in 36 years.").

68. Gibeaut, *supra* note 67, at 50, 51 (describing defeat of Justice White and challenges to other judges).

69. Jeff Woods, *Public Outrage Nails a Judge*, NASHVILLE BANNER, Aug. 2, 1996, at 1A (reporting that Governor Sundquist and Senators Fred Thompson and Bill Frist all announced their opposition to White).

Justice White is the most recent example of a state court judge removed from office after campaigns that promised results — more death sentences, not justice — and that relied on distortions of a judge's record to make the judge appear "soft on crime."<sup>70</sup>

In 1986, the Governor of California, George Deukmejian, publicly warned two justices of the state's supreme court that he would oppose them in their retention elections unless they voted to uphold more death sentences.<sup>71</sup> Obviously, he did not know the legal issues presented by those cases; all he was interested in was results. Deukmejian had already announced his opposition to Chief Justice Rose Bird because of her votes in capital cases.<sup>72</sup> Apparently unsatisfied with the subsequent votes of the other two justices, the governor carried out his threat.<sup>73</sup> He opposed the retention of all three justices, and all lost their seats after a campaign dominated by the death penalty.<sup>74</sup> Deukmejian appointed their replacements in 1987.

After a decision by the Texas Court of Criminal Appeals, reversing the conviction in a particularly notorious capital case, a former chairman of the state Republican Party called for Republicans to take over the court in the 1994 election.<sup>75</sup> The voters responded to the call. Republicans won every position they sought on the court that year.<sup>76</sup> One candidate for the court, Stephen W. Mansfield, campaigned on promises of greater use of the death penalty, greater use of the harmless-error doctrine, and sanctions for

70. For a more detailed description of other such campaigns, see Bright & Keenan, *supra* note 57, at 784-92; Gibeaut, *supra* note 67, at 50, 51.

71. Steve Wiegand, *Governor's Warning to 2 Justices*, S.F. CHRON., Mar. 14, 1986, at 1.

72. Leo C. Wolinsky, *Governor's Support for 2 Justices Tied to Death Penalty Votes*, L.A. TIMES, Mar. 14, 1986, pt. 1, at 3.

73. Henry Unger, *Will Vote Against Grodin, Reynoso, Deukmejian Says*, L.A. DAILY J., Aug. 26, 1986, at 1.

74. Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, pt. 1, at 1 (describing how Rose Bird's "box score" of sixty-one reversal votes in sixty-one capital cases became "constant refrain of the campaign against her," and how campaign commercials against other two justices in last month of race insisted "that all three justices needed to lose if the death penalty is to be enforced"); see also Philip Hager, *Grodin Says He Was "Caught" in Deukmejian's Anti-Bird Tide*, L.A. TIMES, Nov. 13, 1986, pt. 1, at 3 (quoting defeated Justice Joseph R. Grodin saying that he was defeated in "tide of opposition to the chief justice and frustration over the death penalty").

75. Janet Elliott & Richard Connelly, *Mansfield: The Stealth Candidate; His Past Isn't What It Seems*, TEX. LAW., Oct. 3, 1994, at 1. The case was *Rodriguez v. State*, 848 S.W.2d 141 (Tex. Crim. App. 1993, no pet.).

76. John Williams, *Election '94: GOP Gains Majority in State Supreme Court*, HOUS. CHRON., Nov. 10, 1994, at A29.

attorneys who file "frivolous appeals especially in death penalty cases."<sup>77</sup> Before the election, it came to light that Mansfield had misrepresented his prior background, experience, and record;<sup>78</sup> that he had been fined for practicing law without a license in Florida;<sup>79</sup> and that — contrary to his assertions that he had experience in criminal cases and had "written extensively on criminal and civil justice issues" — he had virtually no experience in criminal law.<sup>80</sup> Nevertheless, Mansfield received fifty-four percent of the votes in the general election, defeating the incumbent judge, a conservative former prosecutor who had served twelve years on the court and had been supported by both sides of the criminal bar.<sup>81</sup> After his election, *Texas Lawyer* declared Mansfield an "unqualified success."<sup>82</sup>

Justice James Robertson was voted off the Mississippi Supreme Court in 1992. His opponent in the Democratic primary ran as a "law and order candidate" with the support of the Mississippi Prosecutors Association.<sup>83</sup>

77. Elliott & Connelly, *supra* note 75.

78. Before the election, Mansfield admitted to lying about his birthplace (he claimed to be born in Texas, but was born in Massachusetts), the amount of time he had spent in Texas, and his prior political experience. *Id.*; Janet Elliott, *Unqualified Success: Mansfield's Mandate; Vote Makes a Case for Merit Selection*, TEX. LAW., Nov. 14, 1994, at 1 (reporting that Mansfield was unable to verify campaign claims regarding number of criminal cases he had handled and had portrayed himself as political novice despite having twice unsuccessfully run for Congress); *see also* Editorial, *Do It Now*, FORT WORTH STAR-TELEGRAM, Nov. 12, 1994, at 32 (calling for reform of judicial selection system in Texas and for immediate challenge to Mansfield's election because he had "shaded the truth of virtually every aspect of his career"); *Q & A with Stephen Mansfield: 'The Greatest Challenge of My Life'*, TEX. LAW., Nov. 21, 1994, at 8 (printing post-election interview with Mansfield in which he "retracts" several statements made before and during interview). After the election, it was discovered that Mansfield had failed to report \$10,000 in past-due child support when he applied for his Texas law license in 1992. *Child Support Allegations Threaten Judge Seat*, FORT WORTH STAR-TELEGRAM, Dec. 10, 1994, at 29.

79. Williams, *supra* note 76.

80. Elliott & Connelly, *supra* note 75. Mansfield received the support of victims' rights groups. *Id.*

81. Elliott, *supra* note 78. Mansfield won 54% of the vote in the general election; his opponent, Judge Charles F. Campbell, received 46%. *Id.* Mansfield had previously won the Republican nomination for the seat, winning 67% of the primary vote in defeating John Cossum, a former state and federal prosecutor who was working as a criminal defense lawyer in Houston. Elliott & Connelly, *supra* note 75.

82. Elliott, *supra* note 78.

83. David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1, 15-20 (1992). The resolution of the Mississippi Prosecutors Association asserted that Robertson's opponent "best represents the views of the law abiding citizens" and "will give the crime victims and the good, honest and law abiding people of this state a hearing that is at least as fair as that of the criminal in child abuse, death penalty, and other serious criminal cases." *Id.* at 16 n.108.

Robertson was attacked for a concurring opinion he had written expressing the view that the Constitution did not permit the death penalty for rape when there was no loss of life.<sup>84</sup> However, Robertson and his fellow justices who had taken an oath to uphold the Constitution of the United States had no choice. The United States Supreme Court had held ten years earlier that the Eighth Amendment did not permit the death penalty in such cases.<sup>85</sup>

Robertson's opponents also told Mississippi voters that Robertson believed "a defendant who 'shot an unarmed pizza delivery boy in cold-blood' had not committed a crime serious enough to warrant the death penalty."<sup>86</sup> In truth, Justice Robertson filed a dissent in the case expressing his view that because the trial court had failed to define the "heinous, atrocious or cruel" aggravating factor for the jury, it should be remanded for a new sentencing hearing.<sup>87</sup> He did not suggest that the crime was not serious enough to warrant a death sentence on remand.

The eventual disposition of the case vindicated the position taken in dissent by Justice Robertson. The United States Supreme Court granted *certiorari* and remanded the case to the Mississippi Supreme Court because it could not tell how the majority of the Mississippi court had resolved the issue.<sup>88</sup> On remand, the Mississippi Supreme Court reversed the case and remanded it to the trial court for a new sentencing hearing.<sup>89</sup> Thus, had Justice Robertson's view prevailed on the initial appeal, it would have saved four years and considerable costs and reduced the time for the resentencing in the case. If anything, Justice Robertson's dissent would appear to be an indication of his abilities as a judge and not a basis for removing him from the court.

Those who suggest that this is nothing more than democracy in action misunderstand the role of courts in our society and the importance of inde-

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84. *Leatherwood v. State*, 548 So. 2d 389, 403-06 (Miss. 1989) (Robertson, J., concurring) (expressing view that there was "as much chance of the Supreme Court sanctioning death as a penalty for any non-fatal rape as the proverbial snowball enjoys in the nether regions"). An editorial attacking the decision was reprinted in advertisements for Robertson's opponent. Editorial, *Court's Ruling Morally Repugnant*, CLARION-LEDGER (Jackson, Miss.), July 2, 1989, reprinted in Editorial, *On March 10, Vote for Judge James L. Roberts, Jr. for the Mississippi Supreme Court*, N.E. MISS. DAILY J., Mar. 7, 1992 (Campaign Supp.), at 6.

85. *Coker v. Georgia*, 433 U.S. 584, 600 (1977).

86. Case, *supra* note 83, at 18.

87. *Clemons v. State*, 535 So. 2d 1354, 1367-68 (Miss. 1988) (Robertson, J., dissenting), *rev'd sub nom.* *Clemons v. Mississippi*, 494 U.S. 738 (1990), *remanded for resentencing sub nom.* *Clemons v. State*, 593 So. 2d 1004 (Miss. 1992).

88. *Clemons v. Mississippi*, 494 U.S. at 750-52.

89. *Clemons v. State*, 593 So. 2d at 1007.

pendent courts. As Judge William Cranch wrote, courts have a duty to decide the legal issues before them "undisturbed by the clamor of the multitude."<sup>90</sup> Often that includes protecting the rights of various minorities — political, racial, and ethnic. Unlike legislatures or executives, courts are not expected to gauge public opinion by resort to focus groups or public opinion polls before making their decisions. Judges are expected to enforce the law, whether it be the First Amendment rights of the radical right or the radical left to publish unpopular political views, the right of *The New York Times* to publish the Pentagon Papers,<sup>91</sup> or the right of a suspected child molester to a fair and impartial trial. No one has said it better than Justice Robert H. Jackson:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.<sup>92</sup>

The threat that a judge can be removed from office because of an unpopular decision undermines the independence, integrity, and impartiality of the judiciary. A grievance similar to the one made against King George III in the Declaration of Independence could be leveled against those politicians who attack judges for their rulings: "He has made judges dependent on his Will alone, for the tenure of their offices . . . ."

The costs extend far beyond those who are removed from office. The greatest threat to the rule of law comes from those judges who remain on courts, but refuse to enforce the law in instances when an unpopular outcome could jeopardize their careers. Once a judge compromises his or her oath by refusing to enforce the law in order to stay in office or advance to a higher court, both the judge and the court are irreparably diminished. In addition, the credibility of courts suffers when judges are perceived as giving in to political pressures.

The overall quality of justice is affected when courts are composed of judges who seek to produce certain results. The California Supreme Court, which had been one of the most distinguished state supreme courts in the country, is now an undistinguished death mill known mostly for its various

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90. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 303 (1923).

91. *See New York Times Co. v. United States*, 403 U.S. 713 (1971).

92. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).



refinements of the harmless-error doctrine. One scholar has observed that the court's harmless-error decisions reflect a "desire to carry out the death penalty" more than they reflect "jurisprudential theory."<sup>93</sup>

The vulnerability of state court judges also discourages those individuals whom we would most want to be judges from seeking or taking the bench. After what happened to Justice White in Tennessee or Justice Robertson in Mississippi, why would any conscientious lawyer want to accept a seat on one of those courts, knowing that one opinion may be used to misrepresent everything they may do as a judge? Do we want judges who violate the Canons of Judicial Ethics<sup>94</sup> before even taking office by promising certain results to the voters or an executive?

Most fundamentally, however, when judges must depend upon majority approval, courts are unable to perform one of their most important constitutional roles, described by Justice Hugo L. Black, of serving as "havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are . . . victims of prejudice and public excitement."<sup>95</sup> Today, as politicians in both major political parties compete to show who can be the toughest on those who are most defenseless — poor people accused of crime, immigrants, and those on welfare — there is a particularly urgent need for independent courts that can determine whether politically expedient measures pass constitutional muster.

### *Denial of Effective Counsel*

Equally essential to fairness as the right to an impartial and independent judge is the right to counsel. The skills of a lawyer are required to enforce every legal right of the citizen who stands accused. Otherwise, those fundamental protections, designed to ensure a fair trial and a reliable result, mean nothing. Counsel is also essential for the presentation of relevant evidence to the trier of fact. As the Supreme Court observed in *Gideon v. Wainwright*:<sup>96</sup>

[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial

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93. Elliot C. Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases — A Comparison & Critique*, 26 U.S.F. L. REV. 41, 89 (1991).

94. See MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (1990) (prohibiting judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office").

95. *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

96. 372 U.S. 335 (1963).

unless counsel is provided for him. . . . [L]awyers in criminal courts are necessities, not luxuries.<sup>97</sup>

Unfortunately, the promise of *Gideon* that competent counsel would be provided for the poor has not been realized in many states. A stark example is provided by an account of a capital trial in Houston, Texas:

Seated beside his client — a convicted capital murderer — defense attorney John Benn spent much of Thursday afternoon's trial in apparent deep sleep.

His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.

Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the Nov. 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.

When state District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial.

"It's boring," the 72-year-old longtime Houston lawyer explained.<sup>98</sup>

This does not offend the Sixth Amendment, the trial judge explained, because, "[t]he Constitution doesn't say the lawyer has to be awake."<sup>99</sup> The Texas Court of Criminal Appeals apparently agreed with this analysis. It rejected McFarland's claim of ineffective assistance of counsel,<sup>100</sup> applying the standard set by the Supreme Court in *Strickland v. Washington*.<sup>101</sup>

The majority opinion of the Texas court even suggested that it may have been a "strategic move" for the attorney who assisted Benn to allow Benn to sleep because it might cause the jury to have sympathy for McFarland.<sup>102</sup> Judge Baird, who dissented, found this suggestion to be "utterly ridiculous."<sup>103</sup> He pointed out that a "sleeping counsel is unprepared to present evidence, to cross-examine witnesses, and to present any coordinated effort to evaluate evidence and present a defense."<sup>104</sup> He observed:

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97. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

98. John Makeig, *Asleep on the Job? Slaying Trial Boring, Lawyer Says*, HOUS. CHRON., Aug. 14, 1992, at A35.

99. *Id.*

100. *McFarland v. State*, 928 S.W.2d 482, 499 (Tex. Crim. App. 1996, no pet.), cert. denied, 65 U.S.L.W. 31 (U.S. Feb. 18, 1997) (No. 96-5891).

101. 466 U.S. 668 (1984).

102. *McFarland*, 928 S.W.2d at 505 n.20.

103. *Id.* at 527 (Baird, J., dissenting).

104. *Id.* (Baird, J., dissenting).

The trial judge had so little confidence in Benn's ability to represent [McFarland] that [a second attorney] was appointed to assist Benn. But Benn remained the lead attorney. And considering the lack of communication between Benn and [the second attorney], the lack of preparation for trial, and the uncontroverted evidence of Benn's sleeping, I have no confidence in the hand that guided [McFarland's] representation. . . .

. . . Neither attorney interviewed a witness and neither attorney reviewed the extraneous offenses that were to be later admitted. Benn decided which witness he would cross-examine and he informed [co-counsel] of his decision only after the State's examination. Thus, [co-counsel's] preparation for cross-examination of his witnesses could not have been effective because he did not know which witnesses he was to question. And considering the role to which he was relegated, [co-counsel] was in no position to put forward a coordinated defense strategy. Even more disturbing, Benn could sleep during the direct examination and still elect to conduct cross-examination. It seems to me that [co-counsel's] belief that the jury might feel sympathy for [McFarland] was more a desperate hope than reasonable trial strategy.<sup>105</sup>

But George McFarland is not the only person whose lawyer slept during a capital trial in Houston, the city responsible for more executions than any other jurisdiction in the country.<sup>106</sup> Calvin Burdine and Carl Johnson both had the misfortune to have attorney Joe Frank Cannon assigned to defend them. They are among ten clients of Cannon who have been sentenced to death.<sup>107</sup> Cannon has been appointed by judges in Houston to numerous criminal cases in the last forty-five years, despite his tendency to doze off during trial.<sup>108</sup>

In Calvin Burdine's case, the trial court found that Cannon "dozed and actually fell asleep" during trial, "in particular during the guilt-innocence phase when the State's solo prosecutor[] was questioning witnesses and pre-

105. *Id.* at 527-28 (Baird, J., dissenting).

106. Since the reinstatement of capital punishment in 1976, more people have been executed from Harris County, which includes Houston, than from any state in the union except Texas. Barry Shlachter, *State of Execution Texas Keeps No. 1 Ranking in Capital Punishment Through Public Support, Aggressive Prosecution*, *FORT WORTH STAR-TELEGRAM*, Feb. 12, 1995, available in 1995 WL 5622189 ("Death sentences from courts in Houston's county, Harris, alone have accounted for more executions than the second-ranking state, Florida.").

107. Paul M. Barrett, *On the Defense: Lawyer's Fast Work on Death Cases Raises Doubts About System*, *WALL ST. J.*, Sept. 7, 1994, at A1 (reporting that Cannon is known for hurrying through capital trials like "greased lightning," allegedly falling asleep on occasion, and having had ten clients sentenced to death).

108. *Id.*

sentencing evidence."<sup>109</sup> The clerk of the court testified that "defense counsel was asleep on several occasions on several days over the course of the proceedings."<sup>110</sup> Cannon's file on the case contained only three pages of notes.<sup>111</sup> Once again, the Texas Court of Criminal Appeals found that a sleeping attorney was sufficient "counsel" under the Sixth Amendment.<sup>112</sup>

After Carl Johnson had been sentenced to death at a trial in which he was represented by Cannon, his post-conviction appeals were taken by Professor David Dow of the University of Houston Law Center, a supporter of the death penalty.<sup>113</sup> Upon review of the record in the case, Professor Dow found that "the ineptitude of the lawyer . . . jumps off the printed page,"<sup>114</sup> and added that:

During long periods of jury voir dire, while the State was asking questions of individual jurors, the transcripts give one the impression that Johnson's lawyer was not even present in the courtroom. Upon investigation, it turned out that he was in fact present; it's just that he was asleep.<sup>115</sup>

Both the Texas Court of Criminal Appeals and the United States Court of Appeals for the Fifth Circuit held Johnson was not denied his Sixth Amendment right to counsel.<sup>116</sup> Neither court published its opinion.<sup>117</sup> Carl Johnson was executed on September 19, 1995.<sup>118</sup>

When one city — the capital of capital punishment — has three cases in which death was imposed and upheld by the state's highest court even though the defense lawyers were asleep during the trials, it speaks volumes about the lack of commitment to fairness by courts. But equally shocking examples are found throughout the country.

109. *Ex parte Burdine*, 901 S.W.2d 456, 457 (Tex. Crim. App., no pet.) (Maloney, J., dissenting), *cert. denied*, 115 S. Ct. 2256 (1995).

110. *Id.* The clerk testified that counsel "fell asleep and was asleep for long periods of time during the questioning of witnesses." *Id.* at 457 n.1.

111. Barrett, *supra* note 107.

112. *Burdine*, 901 S.W.2d at 456 (denying application for writ of habeas corpus based on ineffectiveness of Cannon).

113. David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 691 (1996).

114. *Id.* at 694.

115. *Id.* at 694-95.

116. *Id.* at 701, 706 n.44.

117. *Id.*

118. DEATH ROW, U.S.A., *supra* note 10, at 8.

A study of homicide cases in Philadelphia, which rivals Houston for its high number of death cases,<sup>119</sup> found that the quality of lawyers appointed to capital cases in Philadelphia is so bad that "even officials in charge of the system say they wouldn't want to be represented in Traffic Court by some of the people appointed to defend poor people accused of murder."<sup>120</sup> The study found that many of the attorneys were appointed by judges based on political connections, not legal ability. "Philadelphia's poor defendants often find themselves being represented by ward leaders, ward committeemen, failed politicians, the sons of judges and party leaders, and contributors to the judges' election campaigns."<sup>121</sup>

Other studies have found the same poor quality of representation in capital cases in one state after another. *The National Law Journal*, after an extensive study of capital cases in six southern states, which account for the vast majority of executions, found that capital trials are "more like a random flip of a coin than a delicate balancing of the scales" because the defense lawyer is too often "ill trained, unprepared . . . [and] grossly underpaid."<sup>122</sup>

The ABA concluded after an exhaustive study that "the inadequacy and inadequate compensation of counsel at trial" was one of the "principal failings" of the capital punishment systems in states today.<sup>123</sup> The ABA's report illustrates the pervasiveness of the problem:

Georgia's recent experience with capital punishment has been marred by examples of inadequate representation ranging from virtually no representation at all by counsel, to representation by inexperienced counsel, to failures to investigate basic threshold questions, to lack of knowledge of governing law, to lack of advocacy on the issue of guilt, to failure to present a case for life at the penalty phase. . . .

. . . Defense representation is not necessarily better in other death penalty states. In Tennessee, for another example, defense lawyers offered no evidence in mitigation in approximately one-quarter of all

119. See Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES, July 16, 1995, § 6 (Magazine), at 21 (noting that Philadelphia County's death row population of 105 is third largest of any county in nation, close behind Houston's Harris County and Los Angeles County).

120. Frederic N. Tulsky, *Big-Time Trials, Small Time Defenses*, PHILA. INQUIRER, Sept. 14, 1992, at A1.

121. *Id.*

122. Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30. Twelve articles examining the quality of representation in numerous cases in the six states appear in *The National Law Journal*. *Id.* at 30-44.

123. Robbins, *supra* note 24, at 16.

death sentences affirmed by the Tennessee Supreme Court since the Tennessee legislature promulgated its current death penalty statute.<sup>124</sup>

Numerous articles and studies make clear the pervasiveness of the problem in all types of criminal cases and the reasons for it: the grossly inadequate funding of indigent defense systems, the lack of public defender programs in many jurisdictions, the lack of independence of defender systems, and the low standard for effective assistance established by the Supreme Court in *Strickland v. Washington*.<sup>125</sup>

The quality of legal representation one receives makes a difference. Judge Alvin Rubin of the Fifth Circuit put it bluntly:

The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel . . . . Consequently, accused persons who are represented by "not-legally-ineffective" lawyers may be condemned to die when the same accused, if represented by *effective* counsel, would receive at least the clemency of a life sentence.<sup>126</sup>

Great outrage has been expressed by many because O.J. Simpson received exceptional legal representation at his trial due to his wealth. But little outrage is expressed about the far more common occurrence in the criminal courts of this land — the wholly substandard representation that the poor receive because of their poverty. But as bad as the counsel provided to poor people is at their trials, most are in an even worse predicament in post-conviction review, when there is no obligation for states to provide counsel at all. One who has been denied the Sixth Amendment right to counsel at trial usually has no recourse. Most poor people cannot, without

124. *Id.* at 65-67.

125. 466 U.S. 668 (1984); see ABA JUV. JUST. PROJECT ET AL., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (Dec. 1995) (describing poor quality of representation for children accused in delinquency proceedings); SPANGENBERG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS 156, 157 (1993) (prepared for State Bar of Texas). See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993); Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363 (1993); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995).

126. *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

counsel, even begin to establish in post-conviction review a claim of ineffective assistance of trial counsel.

### *Fairness Matters*

Fairness is important to achieving just results that command the respect of the community. The lack of fairness in the state court systems seriously undermines the reliability of the results reached in many cases in those courts. Moreover, although the result may be what the public wants in a particular case, ultimately citizens will have little respect for courts that bend with the political winds. No one can be expected to trust or respect judgments obtained at trials in which the accused lacked adequate representation.

Justice Stevens recently observed that the "recent development of reliable scientific evidentiary methods has made it possible to establish conclusively that a disturbing number of persons who had been sentenced to death were actually innocent."<sup>127</sup> This "most dramatically illustrate[s]" the consequences of failure to provide competent legal counsel to the poor, according to Justice Stevens.<sup>128</sup> In the twenty years since the Supreme Court upheld the resumption of capital punishment, fifty-nine persons sentenced to death have been freed after establishing their innocence.<sup>129</sup> The Department of Justice has recently published a report on a number of other persons convicted of crimes, but later exonerated by scientific evidence.<sup>130</sup>

Such clear cases of innocence raise questions about whether other cases that cannot be conclusively resolved by scientific evidence may also involve miscarriages of justice. For example, Lloyd Schlup, who had been sentenced to death in Missouri, was recently granted federal habeas corpus relief by a federal court due to evidence of his innocence.<sup>131</sup> The Supreme Court had held that he was entitled to the hearing at which this evidence was presented.<sup>132</sup> It is doubtful whether he would obtain a hearing under

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127. Stevens, *supra* note 59, at 13.

128. *Id.* at 12.

129. Ted Gest, *A House Without a Blueprint*, U.S. NEWS & WORLD REP., July 8, 1996, at 41. For a description of four hundred cases involving innocent people convicted of capital crimes in the history of the United States, see MICHAEL L. RADELET ET AL., *IN SPITE OF INNOCENCE* (1992).

130. NATIONAL INST. OF JUST., *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL* (1996).

131. Schlup v. Bowersox, No. 4:92CV443-JCH (D. Mo. May 2, 1996).

132. See Schlup v. Delo, 513 U.S. 298 (1995).

the amendments contained in the Antiterrorism Act. Virginia nearly carried out an execution of a person convicted in a very similar case despite questions of innocence.<sup>133</sup>

Questions of the adequacy of the legal process are also raised by several cases of innocent people sentenced to death who were not released by courts until after the media publicized their innocence. For example, Alabama courts ordered the release of Walter McMillian, who spent six years on Alabama's death row for a crime he did not commit, only after the CBS news program *60 Minutes* reported on his innocence.<sup>134</sup> Similarly, it was only after *60 Minutes* publicized the innocence of Clarence Lee Brandley that the Texas courts, which had twice previously denied relief, ordered a hearing that eventually led to his release.<sup>135</sup> Randall Dale Adams, whose story<sup>136</sup> was told in the motion picture *The Thin Blue Line*, was released from death row only because filmmakers demonstrated his innocence.

Fairness also matters because courts make many other decisions in criminal cases besides guilt or innocence. A finding of guilt only raises a second question of how that offender is to be punished. Punishments range from community service, to fines, to ten days in jail, to ten years in prison, to life imprisonment without the possibility of parole, to death.

A fair process is essential to ensuring that such decisions are as well informed as humanly possible. Before the execution of Horace Dunkins by Alabama in 1989, when newspapers reported that Dunkins was mentally retarded, at least one citizen who sat on Dunkins's case as a juror came forward and said she would not have voted for the death sentence if she had known of his mental limitations.<sup>137</sup> Because of the poor legal representation that Dunkins had received from his court-appointed lawyer, evidence of his mental retardation was not presented to the jury. The jury was unable to

133. See Laura LaFay, *Condemned Man Protests Murder Conviction*, VIRGINIAN-PILOT & LEDGER STAR, Sept. 27, 1996, at B7; Stuart Taylor, *Innocent? Execute Anyway*, LEGAL TIMES, Sept. 10, 1996, at 29. Governor George F. Allen commuted the death sentence of Joseph Patrick Payne just three hours before Payne's scheduled execution. Laura LaFay, *Allen Commutes Death Sentence: Reprieve Comes 3 Hours Before Joseph Payne's Scheduled Death*, VIRGINIAN-PILOT & LEDGER STAR, Nov. 8, 1995, at A1. Payne will now serve a life term without the possibility of parole. *Id.*

134. PETE EARLEY, CIRCUMSTANTIAL EVIDENCE: DEATH, LIFE AND JUSTICE IN A SOUTHERN TOWN 335-41, 346-47, 389-91 (1995) (describing *60 Minutes* report and eventual release of McMillian).

135. NICK DAVIES, WHITE LIES: RAPE, MURDER, AND JUSTICE TEXAS STYLE 307-09 (1991).

136. See RANDALL DALE ADAMS ET AL., ADAMS V. TEXAS 242-64, 280-333 (1991).

137. Peter Applebome, *2 Electric Jolts in Alabama Execution*, N.Y. TIMES, July 15, 1989, at A6.



perform its constitutional obligation to impose a sentence based on "a reasoned *moral* response to the defendant's background, character and crime,"<sup>138</sup> because it was not informed by defense counsel of Dunkins's disability. Nevertheless, Dunkins was executed.

Fairness also matters because of the professed commitment of courts to keep improper influences, such as racial prejudice,<sup>139</sup> from influencing the outcome of cases. Racial disparities are found throughout the criminal justice system.<sup>140</sup> Virtually every report that has examined the operation of the death penalty has found racial discrimination in its infliction.<sup>141</sup> One of the most recent reports reaching this conclusion was issued in June of 1996 by the International Commission of Jurists, a highly regarded organization made up of jurists around the world, after a visit to the United States.<sup>142</sup>

Yet courts tolerate racial discrimination and often refuse even to examine issues of racial prejudice. The Supreme Court allowed Georgia

138. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

139. See, e.g., *Holland v. Illinois*, 493 U.S. 474, 488 (1990) (reiterating "earnestness" of Court's "commitment to racial justice" while holding that prosecutorial use of peremptory strikes against African-Americans did not violate Sixth Amendment right to impartial jury); *McCleskey v. Kemp*, 481 U.S. 279, 309, 333 (1987) (describing "unceasing efforts" to eliminate racial influences while finding that racial disparities in capital sentencing do not violate Eighth or Fourteenth Amendments).

140. See, e.g., *Stephens v. State*, 456 S.E.2d 560, 561 (Ga.) (noting that out of 375 persons serving life sentences in Georgia for second conviction for sale or possession with intent to distribute certain narcotics, 98.4% are African-Americans), *cert. denied*, 116 S. Ct. 144 (1995); *State v. Russell*, 477 N.W.2d 886, 887 (Minn. 1991) (finding equal protection violation due to more severe sentences imposed for possession of crack cocaine than for powdered cocaine when 96.6% of those charged with possession of crack cocaine are black and 79.6% of those charged with possession of powdered cocaine are white). See generally Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783 (1981); Samuel L. Myers, Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. COLO. L. REV. 781 (1993); Dennis Cauchon, *Sentences for Crack Called Racist*, USA TODAY, May 26, 1993, at 1A; Ruth Marcus, *Racial Bias Widely Seen in Criminal Justice System*, WASH. POST, May 12, 1992, at A4.

141. See, e.g., U.S. GENERAL ACCT. OFF., REP. NO. GGD-90-57 DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) (reporting that synthesis of twenty-eight studies shows pattern of racial disparities in charging, sentencing, and imposing death penalty under statutes adopted since 1972). See generally Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (1995) (describing racial discrimination in infliction of death penalty and failure of courts to deal with it).

142. See generally INT'L COMM'N OF JURISTS, ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES (June 1996).

to carry out death sentences despite significant racial disparities in the infliction of the death penalty.<sup>143</sup> Two African-American men sentenced to death by an all-white jury in Utah were executed even though jurors received a note that contained the words "Hang the Nigger's" [sic] and a drawing of a figure hanging on a gallows.<sup>144</sup> No court, state or federal, even had a hearing on such questions as who wrote the note, what influence it had on the jurors, and how widely it was discussed by the jurors. William Henry Hance was executed in Georgia without any court holding a hearing on the use of racial slurs by jurors who decided his fate.<sup>145</sup> Other courts have refused to look behind gross racial disparities for discrimination.<sup>146</sup> The tolerance of racial discrimination and the refusal of courts even to deal with these issues reveals a lack of commitment to fairness.

Fairness is crucial if citizens are to see the decisions of courts as legitimate and entitled to respect. Of course, fairness should be assured at the outset. Judges should be insulated from political pressures. Public defender programs should be established and funded to provide competent legal assistance to poor people accused of crimes. All parts of the community should participate in the judicial process and other safeguards should be taken to ensure that racial prejudice does not come into play.<sup>147</sup> But, as we have seen, in many jurisdictions these safeguards are not present.

Moreover, criminal cases are often affected by the passions of the moment. As Justice Stevens observed, "the emotional impact of [capital]

143. *McCleskey v. Kemp*, 481 U.S. 279, 287-91 (1987) (allowing Georgia to carry out executions even though death penalty is four times more likely to be administered in cases in which victim was white than in cases involving black victims).

144. *See Andrews v. Shulsen*, 485 U.S. 919, 920 (1988) (Marshall, J., dissenting from denial of certiorari).

145. *See Hance v. Zant*, 511 U.S. 1013, 1014 (1994) (Blackmun, J., dissenting from denial of certiorari); Bob Herbert, *Jury Room Injustice*, N.Y. TIMES, Mar. 30, 1994, at A15; Bob Herbert, *Mr. Hance's 'Perfect Punishment'*, N.Y. TIMES, Mar. 27, 1994, at D17.

146. *See, e.g., Foster v. State*, 614 So. 2d 455, 463-64 (Fla. 1992) (no hearing required on racial discrimination in infliction of death penalty in Florida); *Stephens v. State*, 456 S.E.2d 560, 561 (Ga.) (holding prima facie case of discrimination was not established even though 98.4% of those serving life sentence for second drug offense were African-American), *cert. denied*, 116 S. Ct. 144 (1995); *Jones v. State*, 440 S.E.2d 161, 163 (Ga.) (no hearing required with regard to racial discrimination in capital sentencing in one Georgia county), *cert. denied*, 115 S. Ct. 154 (1994). *See generally* Bright, *supra* note 141, at 467-80 (describing tolerance of racial discrimination by courts and refusal of courts to hold hearings on issues of racial discrimination).

147. *See, e.g., Turner v. Murray*, 476 U.S. 28, 36-37 (1986) (requiring questioning about racial attitudes in capital cases involving interracial killing). *Turner* applies only to capital cases involving interracial crimes.

cases gives rise to a special risk of error."<sup>148</sup> The failure of some states to provide lawyers during post-conviction review and legislation narrowing post-conviction review suggests that it is more important to hide constitutional error than to expose and correct it. The failure to correct errors found in post-trial review sends the message that constitutional violations are inconsequential. It tells judges, prosecutors, and law enforcement officials that departures from constitutional standards in the quest for convictions and death sentences will be tolerated. The short shrift that the Supreme Court, Congress, and the President have given habeas corpus reaffirms the notion voiced so often by politicians: that the Bill of Rights is nothing more than a collection of "technicalities" that get in the way of convicting the accused and carrying out their sentences. The underlying assumption, of course, is that because those accused are guilty, the denial of process does not matter.

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 restricting the power of federal courts to correct constitutional error in criminal cases represent a decision that results are more important than process, that finality is more important than fairness, and that proceeding with executions is more important than determining whether convictions and sentences were obtained fairly and reliably.

Such a system produces results — convictions and death sentences — but it does not produce justice. All of us should be concerned about that. In Robert Bolt's play, *A Man for All Seasons*, a young man argues that laws that are inconvenient or unpopular should not be followed; indeed, he would "cut down every law in England [to pursue the Devil]."<sup>149</sup> Thomas More responds: "And when the last law was down, and the Devil turned round on you — where would you hide . . . the laws all being flat? This country's planted thick with laws . . . [do you] really think you could stand upright in the winds that would blow then?"<sup>150</sup>

### *The Need for Leadership*

To achieve fairness in our courts we need leadership. Unfortunately, we are not receiving that leadership from our political leaders or our bar leaders. That was not always the case. When Robert F. Kennedy was the Attorney General of the United States he championed the passage of the Criminal Justice Act,<sup>151</sup> which established public defender programs for

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148. Stevens, *supra* note 59, at 13.

149. ROBERT BOLT, *A MAN FOR ALL SEASONS* 66 (1990).

150. *Id.*

151. Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552 (codified as

federal courts. When Florida was asserting that poor people were not entitled to counsel in criminal cases in the case of *Gideon v. Wainwright*<sup>152</sup> and asked other states to file amicus curiae briefs supporting its position, Attorney General Walter Mondale of Minnesota, along with attorneys general of twenty-one other states, filed as amici on Gideon's side, supporting the right to counsel.<sup>153</sup>

Today, we do not have this kind of leadership. Even the most minimal efforts to improve the quality of representation for the poor are opposed by the associations of state attorneys general and district attorneys. Indeed, last year state attorneys general were successful in persuading Congress to remove all federal funding for the small programs that provided representation to individuals sentenced to death.<sup>154</sup> Not a word of protest was heard from the Attorney General of the United States or the White House.

When federal Judge Harold Baer suppressed cocaine and heroin seized by New York City police officers,<sup>155</sup> Republican presidential candidate Robert Dole called for his impeachment,<sup>156</sup> and the Clinton White House suggested it would ask for his resignation if Judge Baer did not reverse his ruling.<sup>157</sup> No leader in either party stepped forward to call Senator Dole or President Clinton to task for the irresponsible statements, to defend judicial independence, and to point out that judges are not to be removed from office because one disagrees with their position.

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amended at 18 U.S.C. § 3006A (1994)).

152. 372 U.S. 335 (1963).

153. *Gideon v. Wainwright*, 372 U.S. 335, 335-36 (1963) (listing twenty-two states and commonwealths supporting indigent defendant's right to counsel in criminal trial and joining in brief as amici curiae). The only two states that supported Florida were North Carolina and Alabama. *Id.* (listing Alabama and North Carolina as amici curiae in support of Florida's position).

154. Coyle, *supra* note 17.

155. *United States v. Bayless*, 913 F. Supp. 232, 243, *vacated on reh'g*, 921 F. Supp. 211 (S.D.N.Y. 1996).

156. Don Van Natta, Jr., *Judges Defend a Colleague from Attack*, N.Y. TIMES, Mar. 29, 1996, at B1 (reporting that "[o]n the Presidential campaign trail in California on Saturday, Senator Dole called for Judge Baer's impeachment").

157. Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at A1 ("The White House put a Federal judge on public notice today that if he did not reverse a widely criticized decision throwing out drug evidence, the President might ask for his resignation.") After criticism by bar leaders, the White House backed off its threat of asking for Judge Baer's resignation, issuing a statement that "the proper way for the executive branch to contest judicial decisions with which it disagrees is to challenge them in the courts." Linda Greenhouse, *Judges As Political Issues; Clinton Move in New York Case Imperils Judicial Independence, Bar Leaders Say*, N.Y. TIMES, Mar. 23, 1996 at A4.

When Justice Penny White was being attacked by the Republican governor of Tennessee and the chair of the Republican Party in that state, responsible members of the party should have stepped forward, pointed out the distortions, and reminded Tennessee voters of the importance of an independent judiciary.

Those of you who have or will graduate from this law school will have the opportunity to provide the leadership that is missing in this nation today. You will be governors, legislators, judges, and community leaders. If nothing else, you can refrain from the demagoguery on crime that so dominates the political discourse in the United States today. You can refrain from demeaning the Bill of Rights by referring to it as nothing more than a collection of technicalities. You can refrain from taking cheap shots at judges who abide by their oaths and uphold the Constitution even when their decisions are not popular.

But you can do much more. You can help educate your fellow citizens about the importance of process, the great value of the Bill of Rights. You can help build indigent defense programs that are independent of judges and prosecutors and that will provide the zealous and effective representation that is essential to the proper working of the adversary system. You can help your fellow citizens understand that when the lawyers at those programs do their jobs they are not defending crime, they are defending the Constitution for all of us. You can help lead us away from the notion that to avoid being soft on crime, one must be hard on the Bill of Rights.

You can raise questions about what kind of society you want for the future. The new Constitutional Court of South Africa recently confronted such a question in deciding the constitutionality of the death penalty for that nation. Finding that South Africa's enlightenment includes a changing outlook, from "vengeance to an appreciation of the need for understanding,"<sup>158</sup> the court concluded that the death penalty is cruel, unusual, and degrading under that country's new constitution.<sup>159</sup>

You can also respond individually by providing your services to those who most desperately need them. They will not be the same people who can pay you the most money. You must decide whether you will use your enormous talents and the outstanding legal education you have obtained here to become wealthy or to serve those most in need. Unfortunately, it is not possible to do both. But remember, it is no sacrifice to receive the same income as that received by teachers, farmers, workers on the assembly line,

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158. *State v. Makwanyane*, 1995 (3) SA 391 (CC), reprinted in 16 HUM. RTS. L.J. 154, 190 (1995) (Langa, J., concurring).

159. *Id.* at 177.

police officers, and other good, decent working men and women who raise families and contribute to their communities. To the contrary, it is a great privilege to devote one's life to things that are important and about which you care passionately.

Regardless of what the national government or your state legislature may decide about its commitment to fairness, you can show your commitment by representing poor people who otherwise would not have a zealous advocate. You can practice law in communities all over this country where there has never been a lawyer who would question the status quo, who would give African-Americans the same representation as white people, who would give the poor the same representation as the rich. If you are willing to live modestly and work hard, you can change that.

You have the opportunity to become what Martin Luther King, Jr., in one of his many great sermons, called "drum majors for justice." Dr. King described the drum major for justice as one who speaks the truth — no matter how unwelcome it may be and no matter how uncomfortable it may make the listener — and as one who gives his or her life to serving others: to feeding the hungry, clothing the naked, and — particularly important for lawyers — to visiting those who are in prison, and to loving and serving humanity.<sup>160</sup> I encourage you to adopt his goal as a drum major for justice: "I just want to be there in love and justice and in truth and in commitment to others, so that we can make of this old world a new world."<sup>161</sup>

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160. A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 259-67 (James M. Washington ed., 1986).

161. *Id.* at 267.

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# ARTICLES

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